33

SUPREME COURT, U.S.
FILED
JAN 8 2006
OFFICE OF THE CLERK

No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PROFESSORS RYAN GOODMAN, DEREK JINKS, AND ANNE-MARIE SLAUGHTER AS *AMICUS CURIAE* SUPPORTING REVERSAL (GENEVA—APPLICABILITY)

MARK A. PACKMAN
Counsel of Record
Gilbert Heintz & Randolph LLP
1100 New York Ave., NW
Suite 700
Washington, DC 20005
(202) 772-2320

Counsel for *Amici*

QUESTION PRESENTED

Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes violates U.S. treaty obligations under the 1949 Geneva Conventions for the Protection of War Victims?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

I. HAMDAN'S COMMISSION VIOLATES THE GENEVA PRISONERS OF WAR CONVENTION 3

A. The GPW Applies to the Conflict in Afghanistan 4

B. Hamdan's POW Status is in Doubt 6

1. Hamdan arguably falls within GPW Article 4(A)(1) 7

2. Hamdan arguably falls within GPW Article 4(A)(4) 14

II. HAMDAN'S COMMISSION VIOLATES COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS 17

A. Common Article 3 Applies to Trans-Territorial Non-International Armed Conflict 18

B. Common Article 3 Applies to International Armed Conflict 23

C. Hamdan's Commission Violates Fair Trial Rights of Common Article 3 25

III. HAMDAN'S COMMISSION VIOLATES FAIR TRIAL RIGHTS UNDER THE PENAL REPRESSION REGIME OF THE GENEVA CONVENTIONS 27

CONCLUSION 30

APPENDIX: *AMICI* A-1

TABLE OF AUTHORITIES

CASES

Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir.), *cert. granted*, 126 S. Ct. 622 (Nov. 7, 2005) 3-4

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) 19

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 16, 17

Ex Parte Quirin, 317 U.S. 1 (1942) 26

Rasul v. Bush, 542 U.S. 466 (2004) 4

In re Yamashita, 327 U.S. 1 (1946) 27

STATUTES, RULES & REGULATIONS

10 U.S.C. § 821 ..... 26, 28

32 C.F.R. § 9.2 ..... 26, 30

32 C.F.R. § 9.4(a)(1)-(3) 26

32 C.F.R. § 9.4(a)(5)(iv) 26

32 C.F.R. § 9.4(b)(2)(ii)(a) 26

32 C.F.R. § 9.6(h) 26, 30

Authorization for Use of Military Force, Pub. L. No. 10740, 115 Stat. 224 (2001) 5

R.C.M. 1201-1206 30

TREATIES

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 US.T. 3115 (1949), art. 49 ..... 27, 28

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217 (1949), art. 50 ..... 27, 28

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) ..... *passim*

Geneva Convention Relative to the Protection of Civilian Persons In Time of War, 6 U.S.T. 3516 (1949) 27, 28

Hague Convention IV, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 (1907) 13, 14

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 263, U.N. GAOR, 54th Sess., U.N. Doc. A/54/RES/263 (2002) 16

UNITED NATIONS

Agreement between the United Nations and the

Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Jan. 16, 2002, annex, art. 4 23

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 75 (2005). 23

U.N. Sec. Council Res. 955, U.N. Doc. S/RES/955 (1994) 23

U.N. Special Rapporteur of the Commission on Human Rights on the situation of human rights in Afghanistan, U.N. Doc. E/CN.4/1985/21 (1985) 23

INTERNATIONAL COURT DECISIONS

Nicaragua v. United States, 1986 I.C.J. 14 ..... 23, 25

Prosecutor v. Akayesu, Appeals Chamber, International Criminal Tribunal for Rwanda, ICTR-96-4-A (2001) 24

Prosecutor v. Delalic, Appeals Chamber, International Criminal Tribunal for Former Yugoslavia, IT-96-21-A (2001) 24, 25

Prosecutor v. Tadic, Appeals Chamber, ICTY, IT-94-1-AR72 (1995) 25

SECONDARY AUTHORITIES

Allan Rosas, *The Legal Status of Prisoners of War* (1976) ..... *passim*

Ahmed Rashid, *Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia* (2000)..... 9

Ann van W. Thomas & A. J. Thomas, International Legal Aspects of the Civil War in Spain, 1936-1939, in *The International Law of Civil War* 111 (Richard A. Falk ed. 1971).....21-22

Charles Decker, *History, Preparation and Processing Manual for Courts-Martial, United States* (1951)..... 27

D.F.J.J. De Stoop, *New Guarantees for Human Rights in Armed Conflicts-A Major Result of the Geneva Conference* 1974-1977, 6 Aus. Y.B. Int'l L. 52 (1974-1975).....25-26

Daniel L. Byman, et al., *Trends in Outside Support for Insurgent Movements* (2001) 22

Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003) 18, 21

G.I.A.D. Draper, *The Geneva Conventions of 1949* at 114-I Recueil des Cours 57 (1965) 21

G.I.A.D. Draper, The Legal Classification of Belligerents, in *Reflections on Law and Armed Conflicts* (1998)..... 15

G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173 (1971)..... 10

Halvard Buhaug & Scott Gates, *The Geography of Civil War*, 39 J. Peace Res. 417 (2002) 22

Howard S. Levie, *Prisoners of War in International Armed Conflict* (1978) 8, 12, 13, 14

Hugh Thomas, *The Spanish Civil War* (2d rev. 2001)..... 21

Idean Salehyan, Transnational Rebels: Neighboring States as Sanctuary for Rebel Groups (manuscript 2005). 23

Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. Y.B. Int'l L. 294 (1949)..... 21

Lassa Oppenheim, *II International Law: A Treatise* (1969) 8

Lindsay Moir, *The Law of Internal Armed Conflict* (2003)..... 20, 21, 25

Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 Air Force L. Rev. 1, 69-70 (2001).... 15

Michael Bothe et al., *New Rules for Victims of Armed Conflicts* (1982)..... 14

Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511 (2005)..... 15

Rohan Gunaratna, *Inside al Qaeda: Global Network of Terror* (2002) 9

Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terror*, 118 Harv. L. Rev. 2653 (2005) 17

W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chi. J. Int'l L. 493 (2003)..... 11, 12, 13, 14

MISCELLANEOUS

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks on the United States (2004) 9

Charge Sheet, *United States v. Hamdan*, *available at* http://www.defenselink.mil/news/Jul2004/d200407 14hcc.pdf 28

Combatant Status Review Board Letters, *available at* www.defenselink.mil/pubs/foi/detainees 8

Commentary, Geneva Convention (III) Relative to the Treatment of Prisoners of War (Jean S. Pictet, ed. 1960) ..... *passim*

Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 (Yves Sandoz et al., eds. 1987) 19, 24, 25

Department of State, *3 Cumulative Digest of United States Practice in International Law, 1981-1988* (1995) 10-11

ICRC, *Customary International Humanitarian Law: Rules* (2005) 11, 12, 25, 26

II-A Final Record of the Diplomatic Conference of Geneva of 1949 11

II-B Final Record of the Diplomatic Conference of Geneva of 1949 ..... 19, 22, 24

Joint Chiefs of Staff, Joint Pub. 4-0 Doctrine for Logistic Support of Joint Operations V-1 & V-2 (2000) 16

Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy (July 7, 2004) 8, 17

Message from the President Transmitting Protocol II to the U.S. Senate, reprinted in S. Treaty Doc. 100-2 (1987) 11

Message from the President Transmitting the Optional Protocol to the Convention on the Rights of the Child, reprinted in S. Treaty Doc. No. 106-37 (2000) 16

Military Commission Instruction No. 2 (Apr. 30, 2003), *available at* http://www.dtic.mil/whs/directives/corres/mco/mci2.pdf 18, 28, 29

Military Commission Instruction No. 3 (July 15, 2005), *available at* http://www.defenselink.mil/news/Aug2005/d20050811MCI3.pdf 26

Sen. Exec. Rep., Sen. Comm. on Foreign Relations, No. 84-9 (1955) 29

U.S. Dep't Army, *Law of War Handbook* (2005) 24

U.S. Dep't Army, *Operational Law Handbook* (2005) 16

White House Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002 ..... 4, 5

INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief addressing the question whether military commissions as currently constituted violate U.S. treaty obligations under the 1949 Geneva Conventions for the Protection of War Victims. *Amici* are professors of law and public policy whose areas of expertise include international humanitarian law. We have an interest in providing this Court with a detailed doctrinal analysis of the treaty provisions relevant to this case. *Amici* are listed in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

The trial of Salim Ahmed Hamdan before a special military commission as provided by current military orders and instructions is fundamentally inconsistent with the 1949 Geneva Conventions for the Protection of War Victims. Hamdan's trial by military commission is prohibited by Article 102 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW); Common Article 3 of the Geneva Conventions; and the penal repression regime common to the Geneva Conventions.

First, Hamdan's commission violates GPW Article 102, which strictly prohibits trial of prisoners of war (POWs) by special military commission. Hamdan retains the right to be treated as a POW because doubts about his POW status have not been resolved in accordance with the GPW. Under GPW Article 5, if any doubt arises as to whether an individual is entitled to the Convention's protections, that person must be afforded all protections "until such time as their status has

---

[1] The parties' letters of consent to the filing of *amici* briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution for preparing or submitting this brief.

been determined by a competent tribunal." The GPW applies to the international armed conflict in Afghanistan.

Although Hamdan could not assert a colorable claim to POW status based merely on his membership in al Qaeda, he might nevertheless qualify for POW status if certain unresolved factual issues are decided in his favor. Because significant factual questions persist about whether Hamdan was sufficiently affiliated with the Taliban government's armed forces and whether he had authorization to accompany these forces, his POW status clearly remains in doubt. Neither the President's collective determinations regarding al Qaeda and the Taliban nor the specific findings of the Combatant Status Review Tribunal (CSRT) undermine Hamdan's claim to POW status. As a consequence, he must be treated in accordance with the GPW until his POW status is determined by a competent tribunal. Hamdan cannot lawfully be tried by special military commission unless such a determination is made.

Second, Hamdan's commission violates Common Article 3 of the Geneva Conventions because it does not constitute a "regularly constituted court" and it fails to provide the "judicial guarantees which are recognized as indispensable by civilized peoples." Regardless of how (a) the factual questions about Hamdan's POW status are decided and (b) the armed conflict with al Qaeda is classified, Hamdan is entitled to the protections of Common Article 3. By its terms, Common Article 3 applies to all "armed conflicts not of an international character." The text, structure, and drafting history of the provision make clear that it applies to hostilities directed against al Qaeda irrespective of whether this conflict is trans-territorial. In addition, the structure and drafting history of the Conventions demonstrate that Common Article 3 provides the minimum humanitarian rules applicable in all armed conflicts—even those that also qualify as international armed conflicts within the meaning of Common Article 2.

Third, Hamdan's commission violates the fair trial rights guaranteed under the penal repression regime of the Conventions. These rules protect all persons charged with violating the Conventions, regardless of whether the accused otherwise qualifies as a protected person under the Conventions. Hamdan's commission is plainly inconsistent with these rules. Most conspicuously, the commission fails to provide an adequate right to appeal. These rules require that the accused "shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial." That is, even if Hamdan is entitled to no other rights-bearing status under the Geneva Conventions, he must receive these fair trial protections in any prosecution for violations of the Conventions. That Hamdan is not formally charged with violations of the Geneva Conventions, as such, is irrelevant. States cannot subvert the requirements of the Conventions simply by manipulating the title of the offense charged. Analysis of each material element of his charged conduct makes clear that he is charged with conduct in violation of Common Article 3.

I. HAMDAN'S COMMISSION VIOLATES THE GENEVA PRISONERS OF WAR CONVENTION

The GPW, 6 U.S.T. 3316 (1949), strictly prohibits trial of POWs by special military commission. Article 102 provides that persons "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The district court correctly held that Hamdan's commission "is not such a court. Its procedures are not such procedures." *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 160 (D.D.C. 2004)), *rev'd*,

415 F.3d 33 (D.C. Cir.), *cert. granted*, 126 S. Ct. 622 (Nov. 7, 2005).

Hamdan retains the right to be treated as a POW because doubts about his POW status have not been resolved through the procedures prescribed in the GPW. Under GPW Article 5, if any doubt exists as to whether an individual is entitled to its protections, that person must be afforded all protections "until such time as their status has been determined by a competent tribunal." Therefore, Hamdan's commission violates the GPW provided that (1) he was captured in the context of an armed conflict governed by the GPW; (2) his POW status is in doubt; and (3) this doubt has not been resolved through procedures that comport with GPW Article 5. Each condition is plainly satisfied.

A. The GPW Applies to the Conflict in Afghanistan

GPW Article 2 provides that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." It is undisputed that Afghanistan and the United States are, and were at all relevant times, GPW High-Contracting Parties. The parties also agree that the Taliban controlled Afghanistan when U.S. armed forces invaded the country "to wage a military campaign against al Qaeda and the Taliban regime that had supported it." *Rasul v. Bush*, 542 U.S. 466, 470 (2004). Therefore, the U.S. was engaged in "armed conflict" with a High Contracting Party. Indeed, the Government concedes that the GPW applies to the conflict between the Taliban and the United States. White House Fact Sheet, Status of Detainees at Guantanamo, Feb. 7, 2002.[2]

[2] Of course, the President also determined that captured Taliban fighters are not entitled to GPW protection, notwithstanding the fact that the GPW applies to the conflict, because these fighters failed to satisfy the behavioral and organizational prerequisites for POW status provided in

It is also undisputed that Hamdan was captured within Afghanistan during this armed conflict. The Government nevertheless disputes the applicability of the GPW to Hamdan because he was a member of al Qaeda, a terrorist organization that is not a High Contracting Party to the GPW. To bolster this point, the Government suggests that GPW Article 2 speaks directly to such circumstances by providing that: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."

These points, however, demonstrate only that the GPW does not apply to al Qaeda as such. Even if all the Government's contentions are correct, this proves only that no individual could qualify as a POW by virtue of his relationship to al Qaeda. Enemy persons captured in this conflict might nevertheless have rights under the GPW *by virtue of his affiliation* with a High Contracting Party. Here, the GPW covers the armed conflict with the Taliban, because it governed Afghanistan when the United States invaded; therefore, the question becomes which groups and individuals bear the sort of *de jure* or *de facto* relationship to the Taliban to qualify as "protected persons" under the GPW.

The President's determination that the United States was engaged in two conflicts—one with the Taliban and one with al Qaeda[3]—is also unavailing here. Although the "mutual

---

GPW Article 4. White House Fact Sheet, *supra*. Whether the GPW applies to the conflict in which he was captured is, as these paired findings make clear, a separate question from whether Hamdan qualifies as a "protected person" in that conflict. GPW, art. 4.

[3] It is not clear that the President has made any such a determination as a formal matter. White House Fact Sheet, *supra*. Instead, the Administration has maintained that the entire conflict—against al Qaeda and those who harbor them—proceeds under the authority of a single authorization to use military force. Authorization for Use of Military Force, Pub. L. No. 10740, 115 Stat. 224 (2001).

relations" language of GPW Article 2 clearly contemplates that the treaty relations of the parties to the conflict should be disaggregated in some circumstances, GPW Article 4 forecloses disaggregation of a state and those irregular forces that "form part of," and those individuals authorized to accompany, the armed forces of that state, provided they satisfy the other requirements of the provision. GPW, art. 4(A)(1), 4(A)(4).

B. Hamdan's POW Status is in Doubt

Under GPW Article 5, individuals whose POW status is in doubt are entitled to the full protection of the Convention "until such time as their status has been determined by a competent tribunal." Hamdan's POW status is in doubt because the validity of his claim turns on unresolved factual questions.

The Government argues that Hamdan's status is not in doubt because he does not have a colorable claim to POW status given: (1) the President's collective determinations about al Qaeda; and (2) the individualized findings of the Combatant Status Review Tribunal (CSRT) in Hamdan's case, that he was a member of, or affiliated with, al Qaeda. The Government's position, in short, is that Hamdan is clearly not entitled to POW status because the President, acting in conjunction with the CSRT, has determined that he is not. This position, however, is predicated on a clearly flawed reading of the GPW and an unwarranted application of CSRT findings to questions of POW status.

Hamdan's status remains in doubt because he arguably falls within two distinct categories of persons entitled to POW status: Article 4(A)(1) and 4(A)(4).[4] Determining

[4] GPW Article 4(A) provides that any person who falls "into the power of the enemy" qualifies as a POW if he belongs to any one of six categories. The six categories include:

whether he falls within one of these categories requires individualized factual findings (in the case of Articles 4(A)(1) and 4(A)(4)); and collective determinations different in kind from those already made by the President (in the case of Article 4(A)(1)).

1. Hamdan arguably falls within GPW Article 4(A)(1)

An individual qualifies for POW status under Article 4(A)(1), either as a member of the armed forces of the state or a member of a fighting force formally incorporated into these armed forces. Here, Hamdan qualifies under 4(A)(1) if he is either a member of the Taliban forces or a member of a volunteer or militia group (al Qaeda) "forming part of" the Taliban forces.

Hamdan has had no reasonable opportunity to present any claim, or evidence supporting it, that he was individually a member of, or affiliated with, the Taliban forces. The CSRT process cannot possibly afford this opportunity

---

4(A)(1) "Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces."

4(A)(2) "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, or organized resistance movements, fulfill the following conditions: [specifying four conditions] . . . .

4(A)(4) "Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization, from the armed forces which they accompany . . . ."

GPW, art. 4(A).

because the issue whether a defendant is a POW is not even under consideration in that process. On the contrary, the purpose of the CSRT process is to determine if detainees are "enemy combatants," not to assign detainees any rights-bearing status. Memorandum from the Deputy Secretary of Defense to the Secretary of the Navy 1 (July 7, 2004). Under these circumstances, Hamdan had no incentive or reason to assert his membership in the armed forces of the Taliban, because such an admission would have plainly supported a finding that he was an "enemy combatant."[5] Further, the CSRT finding that Hamdan was "a member of or affiliated with" al Qaeda does not rule out his membership or affiliation with the Taliban armed forces. On the contrary, he may be a member of both organizations independently. In the publicly available government reports filed in the CSRTs, the government alleged that 196 of 454 suspected combatants (43%) were members or affiliates of both the Taliban and al Qaeda. *See* Combatant Status Review Board Letters, at www.defenselink.mil/pubs/foi/detainees.

Even if Hamdan is not directly and in his individual capacity a member of the regular armed forces of the Taliban, he qualifies under 4(A)(1) if a group of which he is a member is itself formally affiliated with the Taliban. That is, Hamdan might qualify under 4(A)(1) even if he was a member of al Qaeda, provided that al Qaeda itself is formally incorporated into the Taliban forces. Whether a group is formally incorporated into the armed forces of the government, for the purposes of 4(A)(1), is a determination made solely by reference to the domestic law and practice of each country. Allan Rosas, *The Legal Status of Prisoners of War* 329 (1976); Howard S. Levie, *Prisoners of War in International Armed Conflict* 36 (1978); Lassas Oppenheim,

---

[5] The CSRTs, as designed, ask the wrong question in a much more fundamental sense. Indeed, an affirmative finding by the CSRT that Hamdan is a member of or associated with an enemy fighting force would only support his classification as a POW, not detract from it.

II International Law: A Treatise 255 (1969). The central question under 4(A)(1) then is whether al Qaeda, or some subset of al Qaeda of which Hamdan is a member, is "organizationally link[ed]" with the Taliban. Rosas, *supra*, at 328.

The leading study of al Qaeda documents that al Qaeda fighters comprised a brigade of the Taliban forces. Rohan Gunaratna, *Inside al Qaeda: Global Network of Terror* 58-60 (2002); *id.* at 58 (noting that the "055 Brigade" was "integrated into" the army to fight the Northern Alliance through 2001, and constituted the "shock troops of the Taliban ... function[ing] as an integral part of the [Taliban's] military apparatus"); Ahmed Rashid, *Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia* 139 (2000).[6] The 9/11 Commission Report also notes the close organizational affiliation between al Qaeda forces and the military structure of the Taliban—strongly suggesting some degree of formal integration of the former into the latter. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks on the United States* 59-63 (2004); *id.* at 61 (documenting that Al Qaeda members "enjoy[ed] the use of official Afghan Ministry of Defense license plates"). Moreover, formal factual assertions made by the government in the CSRT process suggests substantial overlap and integration between al Qaeda and the Taliban. As noted above, 43 percent of the available CSRT reports allege that suspected combatants were members or affiliates of both the Taliban and al Qaeda.

Whether al Qaeda, or the sub-group of al Qaeda of which Hamdan is alleged to be a member or affiliate, "form[ed] part of" the Taliban armed forces is the very sort of factual question that raises "doubt" within the meaning of the GPW. It is well understood that the distinction between groups "forming part of," rather than simply "belonging to," a party

---

[6] These forces were, in turn, integrated into various specific combat detachments of the Taliban. *See* Gunaratna, *supra*, at 58.

is "difficult to draw in practice," particularly if the formal basis of incorporation is "defective or ambiguous." Rosas, *supra*, at 331. "The complexity of the conditions attaching to combatant status for irregular fighters [including the collective determination regarding affiliation] is met by the certainty of the obligation in [GPW] Article 5(2)." G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 198 (1971). In such circumstances, "many individuals will fall into the hands of the adversary whose status is as doubtful as their hostile actions are certain." *Id.*

No findings on this matter have been made; indeed, no such factual inquiry has been conducted. Hamdan's status under 4(A)(1), therefore, is in doubt—he has a sound legal basis for claiming this status, supported by plausible factual assertions.

The President's collective determinations about al Qaeda, even if procedurally adequate under the GPW, do not extinguish Hamdan's claim to POW status. The President determined that al Qaeda, as an organized fighting force, did not satisfy the behavioral and organizational prerequisites for POW status outlined in GPW Article 4(A)(2)(a)-(d): the group failed to operate under a responsible command structure; wear a fixed, distinctive sign; carry their arms openly; or conduct their operations in accordance with the laws of war. These findings, however, would foreclose Hamdan's invocation of only Article 4(A)(2), because the four criteria for POW status under Article 4(A)(2) do not apply to Article 4(A)(1) forces. First, the text of Article 4 clearly makes these criteria applicable only to 4(A)(2). *Compare* GPW Article 4(A)(2) (listing four criteria for irregular forces "belonging to a party" to the conflict) *with* 4(A)(1) (not listing any such qualification for militia and volunteer corps "forming part of" the armed forces of a party); *accord* Department of State, *3 Cumulative Digest of United States Practice in International Law, 1981-1988* at

3459 (1995); ICRC, *Customary International Humanitarian Law: Rules* 15, 385 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 508-12 (2003). Second, the drafting history of Article 4 demonstrates that the criteria were intended to apply only to 4(A)(2). At the 1949 Treaty Conference in Geneva, the special committee drafting what would become GPW Article 4 explicitly rejected a proposed amendment that would have made the four criteria expressly applicable to 4(A)(1). *II-A Final Record of the Diplomatic Conference of Geneva of 1949*, at 465-67, 561-63.[7] *See also* Rosas, *supra*, at 328 ("both in view of the wording and the legislative history of Article 4 it cannot be a priori concluded that the four conditions of Article 4(A)(2) are constitutive conditions for prisoner-of-war status with respect to regular forces"); Parks, *supra*, at 510 n.30 (rejecting view that the 4(A)(2) conditions apply to 4(A)(1) in part because "this view is not consistent with . . . the negotiating history of the four criteria").[8]

---

[7] The amendment was proposed by the United Kingdom, and the United States voted against it. *II-A Final Record*, *supra*, at 561-63.

[8] This argument is not called into question by the U.S. opposition to the 1977 Protocol I Additional to the Geneva Conventions (Additional Protocol I). Although the United States specifically opposed Article 43 of the Protocol which relaxed the requirements for lawful combatancy (and hence, POW status), the U.S. government made clear that it opposed relaxing these requirements for irregular forces. *See* Message from the President Transmitting Protocol II to the U.S. Senate, reprinted in S. Treaty Doc. 100-2, at IV (1987) (explaining President Reagan's decision not to submit Protocol I for ratification because it "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war"); Parks, *supra*, at 510 ("Most paragraphs of Article 44, Additional Protocol I, amended the customary law of war with respect to entitlement to prisoner of war status for private groups (so-called 'liberation movements'").). In other words, the United States opposed relaxing the four criteria enumerated in GPW Article 4(A)(2) for the very category of forces described in 4(A)(2)—forces not forming part of the regular armed forces of a state. Accord Rosas, *supra*, at 327-33 (noting that "irregular" forces are independent

That the 4(A)(2) conditions do not apply to 4(A)(1) is not called into question by claims that 4(A)(1) "assumes" that members of the armed forces will wear uniforms. First, "assumes" is not the same as requires. The Government must do much more to prove that 4(A)(1) includes the four conditions as *prerequisites* for POW status. Indeed, the formal affiliation with a state party required in 4(A)(1) is itself a sufficient guarantee of regularization of the armed forces in question. *See* ICRC, *Rules*, *supra*, at 15 ("The idea underlying [4(A)(1)] is that the regular armed forces fulfill these conditions *per se* and, as a result, they are not explicitly enumerated with respect to them."). Second, the relevant authorities to which the Government may refer do not maintain that 4(A)(1) assumes the armed forces will satisfy *all four* conditions. *See, e.g.*, *Commentary, Geneva Convention (III) Relative to the Treatment of Prisoners of War* 51-52 (Jean S. Pictet, ed. 1960) (suggesting that only wearing uniforms may be assumed); Levie, *supra*, at 37 n.142 (endorsing the view of ICRC Commentary). Third, these authorities consider uniforms only a *practical* necessity in some circumstances so that captors might identify prisoners as members of the armed forces. *III Commentary*, *supra*, at 52 (suggesting that the uniform serves only identification purposes and concluding: "[i]f need be, any person to whom the provisions of Article 4 are applicable can prove his status by presenting the identity card"); Parks, *supra*, at 543. That alternative devices (such as an I.D. card) can substitute for a uniform demonstrates that wearing a uniform is not a prerequisite to POW status under 4(A)(1).

Additionally, that individual conduct inconsistent with the four conditions can—under special circumstances—

---

forces covered by 4(A)(2), and that 4(A)(1) covers "regular," dependent forces). Thus, U.S. opposition to Additional Protocol I supports only the (already incontestable) point that al Qaeda forces not forming part of the regular armed forces of the Taliban do not qualify for POW status unless they satisfy the four criteria of GPW Article 4(A)(2).

deprive a member of the armed forces of certain POW privileges is consistent with the non-applicability of the four criteria to 4(A)(1). For instance, combatant conduct that abrogates one or more of the four criteria might constitute war-crimes under some circumstances, thereby depriving the captured fighter of combatant immunity for those acts, *even if the fighter in question has been determined to be a POW.* Conduct such as not wearing a uniform may satisfy one element of those war crimes. For example, soldiers commit perfidy when they wear civilian clothing with the intent to deceive and the deception constitutes the proximate cause of killing a protected person. Parks, *supra*, at 542. As a result, a member of the armed forces who does not wear a uniform while satisfying the other elements of perfidy may be tried and convicted as a war criminal. *See, e.g.*, Parks, *supra*, at 512-13 ("Wearing a partial uniform, or even civilian clothing, is illegal only if it involves perfidy . . . . Military personnel wearing non-standard uniform or civilian clothing are entitled to prisoner of war status if captured."); Levie, *supra*, at 37. Again, whether a member of the armed forces is immune from prosecution for such war crimes is a separate determination from the determination of POW status. Levie, *supra*, at 37 n.143; GPW, art. 85.[9]

---

[9] Persons captured in enemy territory out of uniform have occasionally been denied POW status and treated as "spies"—a special category of captured combatant in the law of war. Parks, *supra*, at 509-12 and notes. These persons were denied POW status, however, not because they failed to satisfy the four criteria, but rather because they were spies. *Id.* The question of the application of the four criteria to regular forces is conceptually distinct. Indeed, the multiple elements of the offense of spying make clear that more than absence of a uniform is required—the location of capture and accompanying conduct—to deny POW status. Moreover, "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage." Hague Convention IV, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 (1907), art. 31. One commentator also suggests that "saboteurs," defined as persons who shed their uniform and carry out

2. Hamdan arguably falls within GPW Article 4(A)(4)

Hamdan also arguably qualifies as a person authorized to accompany the armed forces without actually being a member thereof. GPW Article 4(A)(4). This provision explicitly covers "supply contractors" and "labor units" providing support to the armed forces. Leading treatises have also identified "drivers," Levie, *supra*, at 61 (identifying example of ambulance drivers), and persons working in "transporting supplies" as emblematic. *See* Michael Bothe et al., *New Rules for Victims of Armed Conflicts* 672 (1982). Whether Hamdan qualifies under 4(A)(4) turns on whether he received authorization from the Taliban to accompany its armed forces. *III Commentary*, *supra*, at 64-65; Rosas, *supra*, at 303. This is a factual determination to be made by an Article 5 tribunal.

Although Article 4(A)(4) obligates the state party to provide such persons with identification cards, "the possession of such a card is *not* a necessary condition for prisoner-of-war status." *Id.*; *cf.* Hague Convention IV, *supra*, at art. 13 (recognizing POW status for such persons "provided they are in possession of a certificate from the military authorities of the army which they were accompanying"). It is well understood that the identification card requirement was abandoned in the 1949 GPW. Levie, *supra*, at 62 (pointing out that 4(A)(4) status is "now dependent upon proof that he had received authorization from the military authorities . . . and that proof may consist of an identity card, or some other evidence"). Here, there have been no factual findings regarding Hamdan's status

---

acts of sabotage on enemy territory, receive the same treatment upon capture as spies. Levie, *supra*, at 37-38; *but see* Parks, *supra*, at 510 n.31 (rejecting this view). For the same reasons just discussed with respect to spies, the fact of this offense does not support the applicability of the four criteria to regular armed forces.

under Article 4(A)(4). Indeed, he has had no reasonable opportunity to present evidence concerning this status. Such factual uncertainty is explicitly cited in the ICRC Commentary on Article 5 as a paradigmatic instance of "doubt" requiring a hearing before a competent tribunal. *III Commentary*, *supra*, at 77.

The CSRT designation of Hamdan as an "enemy combatant" does not undermine his claim to 4(A)(4) status. First, this finding, if anything, supports his claim in that it tends to establish only that he was affiliated with the armed forces of the enemy. The precise nature of this affiliation, as demonstrated above, has not yet been determined, and his claim to 4(A)(4) status, like his claim to 4(A)(1) status, turns on the nature of this affiliation.

Second, the commission of belligerent acts would not deprive Hamdan of 4(A)(4) status. Although persons accompanying the armed forces within the meaning of 4(A)(4) "enjoy no general right to take part in the hostilities," Rosas, *supra*, at 302, this means only that these persons enjoy no "combatant's privilege" with respect to any such participation. Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE L. REV. 1, 69-70 (2001). The commission of belligerent acts, however, *does not deprive* such persons of 4(A)(4) status. *Id.* at 69 ("Civilians who accompany the armed forces and commit belligerent acts become unlawful combatants and are subject to trial, but do not lose their right to POW status."); G.I.A.D. Draper, The Legal Classification of Belligerents, in *Reflections on Law and Armed Conflicts* 196, 197 (1998); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 520 n.42 (2005). As with the prosecution of POWs for war crimes, the question of a detainee's legal liability for acts committed in combat is separate from the question of his status as a particular kind of detainee.

Third, the definition of "enemy combatant" employed by the CSRTs is substantially broader than the traditional definition of combatant in the law of war. Only persons taking "direct" or "active" part in hostilities are combatants under the law of war. *See, e.g.*, Joint Chiefs of Staff, Joint Pub. 4-0 Doctrine for Logistic Support of Joint Operations V-1 & V-2 (2000) (defining combatant category to exclude civilians performing such functions as maintenance of weapon systems, C2 infrastructure, and communication systems; and construction of roads, airfields, other important infrastructure, transportation services, and prison facilities); U.S. Dep't Army, *Operational Law Handbook* 14, 17, 78 & 398 (2005). The United States formally endorsed this definition in signing (in 2000) and ratifying (in 2002) the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 263, U.N. GAOR, 54th Sess., U.N. Doc. A/54/RES/263 (2002).[10]

The plurality in *Hamdi* adopted a definition of combatant that closely tracks this well-established law-of-war principle by requiring affiliation with a fighting force and actual participation in the conflict. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 515 (2004) (defining enemy combatant as "an individual who . . . was 'part of or supporting forces hostile

---

[10] The treaty makers adopted the following Understanding:

> the phrase "direct part in hostilities"-
>
> (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and
>
> (ii) *does not mean* indirect participation in hostilities, such as gathering and *transmitting military information, transporting weapons, munitions, or other supplies*, or forward deployment

S. Treaty Doc. No. 106-37 (2000), at 33 (emphasis added). The President's letter of submittal makes plain that the definition in the Protocol and Understanding is indistinguishable from the direct participation standard under the law of war. *See id.* at 37-38.

to the United States or coalition partners' in Afghanistan *and who* 'engaged in an armed conflict against the United States' there") (emphasis added). After *Hamdi*, the Order establishing the CSRTs subtly altered this definition so as to expand substantially the notion of "enemy combatant." Mem. from the Deputy Sec'y of Def. to the Sec'y of the Navy, *supra*, at 1 (defining enemy combatant as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated *forces that* are engaged in hostilities against the United States or its coalition partners. This definition includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces") (emphasis added). *See generally* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terror*, 118 HARV. L. REV. 2653 (2005).

Whatever the acceptability of the CSRT definition as a matter of constitutional law, it is plainly different than the well-settled law-of-war standard. Hence, a finding that Hamdan is an "enemy combatant" within the meaning of the CSRT standard does not establish that he has committed a belligerent act—or that he actively or directly participated in hostilities—within the meaning of the law of war.

In sum, Hamdan must be treated as a POW until he receives an Article 5 tribunal. That tribunal would need to resolve the outstanding factual questions bearing on whether Hamdan qualifies under Article 4(A)(1) or Article 4(A)(4) of the GPW. While Hamdan's status remains in doubt, he may not be subject to prosecution by special military commission because doing so violates GPW, art. 102.

II. HAMDAN'S COMMISSION VIOLATES COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS

Regardless of Hamdan's potential POW rights or the scope of the armed conflict, the military commission violates

Hamdan's right to a fair trial under Common Article 3 of the Geneva Conventions. Common Article 3 secures certain protections for all persons—regardless of status—detained or prosecuted in connection with an armed conflict involving a party to the Conventions. Common Article 3 is designed to be the irreducible minimum applicable to all armed conflict—the core principles on which the rest of the Conventions are founded.

Hamdan is charged with five offenses, each of which requires that the alleged acts "took place in the context of and was associated with an armed conflict." Military Commission Instruction No. 2 (Apr. 30, 2003). As an enemy combatant rendered *hors de combat*, Hamdan must receive the protections recognized in Article 3, which are "applicable automatically, without any condition in regard to reciprocity." *III Commentary*, *supra*, at 35.

A. Common Article 3 Applies to Trans-Territorial Non-International Armed Conflict

Common Article 3 applies to armed conflicts that extend across state borders. The provision regulates "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." In other words, the armed conflict must occur within the territory of at least one state party to the Conventions and may exist between a state and a non-state armed group.

The Government maintains correctly that at least since September 11th, an armed conflict exists between the United States and al Qaeda. *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003). The fact that a non-state actor cannot ratify the Conventions is irrelevant to the application of Common Article 3. By its terms, the article includes armed conflicts between a state

party to the Conventions and a non-state armed group.[11] One of the principal purposes of the article is to extend rights and obligations to members of non-state armed groups. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring).

The Government suggests an unprecedented limitation on Common Article 3 by claiming that conflicts that otherwise qualify under the provision are "of an international character" if they take place on the territory of more than one state. The phrase "of an international character," however, clearly refers to the party structure in a conflict—a conflict between two or more states. *See, e.g.*, *Hamdan*, 415 F.3d at 44; *see also Commentary on the Protocol Additional to the Geneva Conventions of 12 August* 1949, 1351 (Yves Sandoz et al. eds., 1987) ("a non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").

The clause limiting application of the provision to conflicts "occurring in the territory of one of the High Contracting Parties," properly understood, does not support the government's position. The text of the provision, wrenched from its context, could mean the territory of "only one" or "at least one" of the state parties.[12] Common Article 2 twice employs a linguistic formulation similar to Common Article 3. Common Article 2 states: "Although *one of the Powers* in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain

---

[11] Article 3 covers all non-international armed conflicts, including but not limited to civil wars. The drafters specifically rejected proposed amendments explicitly or effectively limiting Article 3 to "civil war." *II-B Final Record of the Diplomatic Conference of Geneva of 1949* at 121; *see also id.* at 327; *III Commentary*, *supra*, at 31.

[12] For illustrative purposes, consider that treaties often require states to undertake actions in "one of the official languages of the United Nations." Understood in light of their context and purpose, these provisions clearly do not prohibit states from using more than one of the official languages.

bound by it in their mutual relations." GPW art. 2 (emphasis added). Read in light of its purpose, this language can only be reasonably interpreted to mean that all the High Contracting parties to a conflict remain bound by the Convention in their mutual relations even if one or more states in the conflict are not party to the Convention—notwithstanding the surface textual plausibility of the "only one" construction. Article 2 also provides that the Conventions apply to any "armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by *one of them*." GPW art. 2 (emphasis added). Again, the context and purpose of the provision make clear that the Conventions apply even if more than one party to a conflict does not recognize a state of war. *III Commentary*, *supra*, at 23; Rosas, *supra*, at 226. In short, these various phrases can be understood only in light of the context and purpose of the relevant provisions.

The Government's interpretation is not faithful to the context and purpose of Common Article 3. The drafting history makes clear that Article 3 was designed to balance the modest humanitarian goals of the Conventions with the sovereignty of states over internal matters. Lindsay Moir, *The Law of Internal Armed Conflict* 23-36 (2003). The purpose of Common Article 3 justifies applying it "as wide[ly] as possible." *III Commentary*, *supra*, at 36. The drafters of the Conventions purposely avoided any rigid formulation that might limit the applicability of Common Article 3. *III Commentary*, *supra*, at 32-37. The only limit on Article 3's application suggested in the drafting history, or even discernable in the abstract, was the sovereign prerogative of states to suppress unrest within their own territory. Moir, *supra*, at 23-36 (summarizing the debates). The principal issue was identifying the circumstances in which such "internal" matters become a legitimate matter of international concern.

Common Article 3 was revolutionary because it subjected wholly internal matters to international humanitarian law. Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT'L L. 294, 300-01 (1949). If the provision governs conflicts completely within a single state, then it certainly governs conflict between states and non-state groups that happens to cross state boundaries. The language of the provision limiting its application to the "territory of one of the High Contracting Parties" serves a different purpose—it makes clear that the provision requires a nexus to the jurisdiction of a state party to the treaty. Jinks, *supra*, at 38-41; Moir, *supra*, at 52-58 (summarizing jurisdictional debate, which was motivated by concern about imposing treaty obligations directly on non-state actors).

Several other aspects of the negotiating history of the Conventions discredit the Government's view. First, the Government can point to no discussion in the drafting negotiations where such an astonishing limitation as that advocated by the Government was contemplated, proposed, or debated. Second, the case that served as the primary impetus for drafting Common Article 3 and provided the paradigmatic case of a conflict covered by the provision—the Spanish Civil War—had substantial transnational dimensions. G.I.A.D. Draper, *The Geneva Conventions of 1949* at 114-I RECUEIL DES COURS 57, 83 (1965). For example, several countries aided one of the sides in the conflict (including sending entire fighting divisions into Spain, providing transport for Franco's troops from Morocco into Spain, and providing use of foreign port facilities); the Spanish forces seized and sank foreign supply ships; and fighting spilled over Spain's borders. *See, e.g.*, Hugh Thomas, *The Spanish Civil War* 357-58, 551-55, 934-44 (2d rev. 2001); Ann van W. Thomas & A. J. Thomas, International Legal Aspects of the Civil War in Spain, 1936-1939, in *The International Law of Civil War* 111, 113-14

(Richard A. Falk ed. 1971). Third, at the Treaty Conference amendments were proposed and rejected that would have *restricted* Common Article 3 to include *only* conflicts, like the Spanish Civil War, "resembling an international war in dimensions." *II-B Final Record*, *supra*, at 123.[13]

The Government's interpretation would also create an inexplicable and unacceptable gap in the Conventions' coverage. Armed conflicts between states and non-state armed groups regularly involve substantial international dimensions with respect to location of armed forces, zones of hostility, and outside support given to the competing parties. According to a leading study, 51% of civil wars in 1946-2000 extended to or across the national border of the conflict-ridden country. Halvard Buhaug & Scott Gates, *The Geography of Civil War*, 39 J. PEACE RES. 417, 425 (2002).[14] Furthermore, according to a study of 74 insurgencies since 1991, "44 received state support that . . . was significant or critical to the survival and success of the movement.... Other outside supporters were also active: 21 movements received significant support from refugees, 19 received significant support from diasporas, and 25 gained backing from other outside actors, such as Islamic organizations or relief agencies." Daniel L. Byman, et al., *Trends in Outside Support for Insurgent Movements* 2 (2001). The world's

---

[13] Moreover, during the negotiations some states expressed concern that more of the provisions of the full Conventions (including those for POWs and the shipwrecked) were not incorporated into Common Article 3. These states argued that such rules should apply since the scope of Article 3 included, as a subset, the kind of "civil wars which resembled international wars." *II-B Final Record*, *supra*, at 123; *id.* at 335 (statement of Switzerland) (discussing "non-international conflicts which most resembled international wars").

[14] These findings likely underestimate the types of activities relevant for our purposes. The researchers measured only "major battle zones" and "areas controlled by rebel groups." Buhaug & Gates, *supra*, at 424. They did not include activities such as lower intensity and sporadic fighting, recruitment, and training that also transcend state borders.

most well-known non-international armed conflicts include major transnational dimensions.[15] Given the notoriety and frequency of such conflicts, it is implausible that the drafters of Common Article 3 meant to exclude such a subset—indeed, any subset—of non-international armed conflicts. The Government offers no theory why the drafters would have excluded such conflicts from the scope of Common Article 3. Such a theory would have to be convincing on its own terms.[16]

B. Common Article 3 Applies to International Armed Conflict

The structure and history of the Conventions demonstrate that Common Article 3 applies to international armed conflict. The article initially appeared as draft text for the preamble to the four Conventions, setting forth the core principles of the treaties. The debate at the Treaty Conference crystallized two potential approaches to the article: (1) make the full Conventions applicable to a narrow range of conflicts; or (2) make the core principles of the Conventions applicable to a broad range of conflicts. The

---

[15] *See, e.g.*, Idean Salehyan, Transnational Rebels: Neighboring States as Sanctuary for Rebel Groups 8, 9, 11 (manuscript 2005) (documenting the trans-territorial fighting, bombing, recruiting, and basing in several non-international armed conflicts including Afghanistan, Cambodia, India, Nicaragua, Rwanda, Sierra Leone, Sudan, Tajikistan, Uganda, and Zimbabwe (Rhodesia)).

[16] International bodies have consistently and unequivocally maintained that Common Article 3 applies to trans-territorial conflicts. *See, e.g.*, U.N. Special Rapporteur of the Commission on Human Rights on the situation of human rights in Afghanistan, U.N. Doc. E/CN.4/1985/21 (1985), at 43; *Nicaragua v. United States*, 1986 I.C.J. 14 ¶ 219; U.N. Sec. Council Res. 955, U.N. Doc. S/RES/955 (1994) (Rwanda); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, Jan. 16, 2002, annex, art. 4; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General 75 (2005).

Conference chose the latter course. *See III Commentary*, *supra*, at 33-34; *II-B Final Record*, *supra*, at 122. According to the "original understanding," Article 3 thus contains the mandatory minimum rules applicable to *all* armed conflicts covered by the Conventions. *See* U.S. Dep't Army, *Law of War Handbook* 144 (2005) ("This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends its application even into non-conflict operations other than war through DoDD 5100.77), but also with the original understanding of its scope as expressed in the official commentary...."); *Prosecutor v. Delalic*, Appeals Chamber, International Criminal Tribunal for Former Yugoslavia, IT-96-21-A ¶¶ 140-50 (2001). As the commentary to the Conventions explains, "[t]his minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions . . . ." *IV Commentary*, *supra*, at 14; *see also id.* at 58.

Indeed, the object of Common Article 3 is to set a low threshold in which the character of an armed conflict is irrelevant to triggering the most fundamental humanitarian protections. *III Commentary*, *supra*, at 35 ("It has the merit of being simple and clear. . . . Its observance does not depend upon preliminary discussions on the nature of the conflict."); *Prosecutor v. Akayesu*, Appeals Chamber, International Criminal Tribunal for Rwanda, ICTR-96-4-A ¶ 441 (2001) (explaining that Common Article 3 applies "under all circumstances").

The Government's claim that Common Article 3 is not applicable to international armed conflict turns the relationship between international law and state sovereignty on its head. The Government's proposition would mean that state authority is more restricted in internal armed conflict than in international armed conflict—whereas the scope of international humanitarian law is uniformly far less

restrictive in the former domain than in the latter. *Prosecutor v. Delalic*, *supra*, ¶ 150 ("It is both legally and morally untenable that the rules contained in Common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. ... something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader.").[17]

C. Hamdan's Commission Violates Fair Trial Rights of Common Article 3

Hamdan's military commission clearly violates the minimum fair trial rights required by Common Article 3. The article permits prosecutions only (1) by "a regularly constituted court" (2) providing "all the judicial guarantees which are recognized as indispensable by civilized peoples." The reference to procedures "recognized as indispensable by civilized peoples" establishes an evolving standard that, by design, tracks customary international law in this area. ICRC, *Rules*, *supra*, at 352 et seq.; Moir, *supra*, at 86–88. Other *amici* analyze these requirements in a more sustained way. We note a couple examples of clear violations.

First, the obligation to conduct prosecutions only by regularly constituted courts requires the use of standing courts—such as U.S. military courts martial—and precludes special or ad hoc tribunals. *IV Commentary*, *supra*, at 340 ("The courts are to be 'regularly constituted'. This wording definitely excludes all special tribunals. It is the ordinary military courts ... which will be competent."); D.F.J.J. De

---

[17] Even if Common Article 3 does not apply as a matter of treaty law, its rules clearly apply as a matter of customary international law. *Nicaragua v. United States*, *supra*, ¶¶ 218, 255; *Prosecutor v. Tadic*, Appeals Chamber, ICTY, IT-94-1-AR72 ¶ 102 (1995).

Stoop, *New Guarantees for Human Rights in Armed Conflicts-A Major Result of the Geneva Conference* 1974-1977, 6 AUS. Y.B. INT'L L. 52, 68 (1974-1975) (Head, General Legal Section, Dep't Foreign Affairs of Australia) ("The words 'regularly constituted court' covers military as well as civil courts. It excludes all special tribunals.").

Second, the obligation to provide essential judicial guarantees requires trial by an independent and impartial court. ICRC, *Rules*, *supra*, at 354-56. Hamdan's commission, however, is limited to the executive branch, with no meaningful independent oversight or review. The President and Secretary of Defense exercise final control over the commission procedures and rulings. 32 C.F.R. § 9.2 & 9.6(h). And, the Appointing Authority for the commissions is an executive branch official who performs fundamental prosecutorial[18] and judicial[19] responsibilities. In short, the commissions bear no markings of independence and impartiality.

Whether Hamdan's commission is a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable" goes to whether he is an "offender . . . triable under the law of war." 10 U.S.C. § 821. This is the question the Court asked in *Quirin* without abstention. *Ex Parte Quirin*, 317 U.S. 1 (1942). If Hamdan qualifies as a person protected by Common Article 3, he may not be tried by ad hoc or special tribunals under the law of war. In this sense, the "regularly constituted court" and

---

[18] The Appointing Authority decides whether to bring charges against the accused. 32 C.F.R. § § 9.2 & 9.4(b)(2)(ii)(a). And, the Chief Prosecutor "report[s] directly to the Legal Advisor to the Appointing Authority and then to the Appointing Authority." Military Commission Instruction No. 3 (July 15, 2005), § 3(B)(2).

[19] The Appointing Authority appoints commission members and can remove members "for good cause." 32 C.F.R. § 9.4(a)(1)-(3). And, the Appointing Authority decides all "interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge." 32 C.F.R. § 9.4(a)(5)(iv).

"judicial guarantees" requirements of Common Article 3 are directly analogous to the "same courts, same procedure" requirement in GPW Article 102. Both sets of rules deprive certain types of tribunals of authority under the law of war to try those protected by the rules. *In re Yamashita*, 327 U.S. 1, 9, 18-23 (1946); Charles Decker, *History, Preparation and Processing Manual for Courts-Martial, United States* 1-4 (1951). This line of reasoning applies with equal force to the penal repression regime argument developed *infra*, Part III.

III. HAMDAN'S COMMISSION VIOLATES FAIR TRIAL RIGHTS UNDER THE PENAL REPRESSION REGIME OF THE GENEVA CONVENTIONS

Even if Hamdan is entitled to no other rights-bearing status under the Geneva Conventions, he must receive the fair trial protections under the Conventions' penal repression regime in any trial for violations of the Conventions. *III Commentary*, *supra*, at 625 (pointing out that the accused is entitled to a more robust list of fair trial rights if in fact they qualify as a "protected person" under the Convention). The enforcement provisions of the Conventions require states to punish "grave breaches" of its substantive rules. The Conventions also require states "to take measures necessary for the suppression of all acts contrary to the provisions of the present Convention." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI), 6 U.S.T. 3115 (1949), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII), 6 U.S.T. 3217 (1949), art. 50; GPW, art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCIV), 6 U.S.T. 3516 (1949), art. 146. These provisions, however, further require states to ensure modest procedural rights for

any individual—regardless of status and circumstance—who is prosecuted for an act in violation of the Conventions.

The Conventions require "[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the [GPW]." GC I, art. 49; GC II, art. 50; GPW, art. 129; GC IV, art. 146. This is a penal repression regime designed to accord some basic safeguards to individuals charged with offenses perpetrated against persons protected by the Conventions. The plain meaning of the text of the provision is underscored by its drafting history. *Id.* (describing drafting history and making clear that the Treaty Conference intentionally worded the provision so as to include such persons).

Hamdan's commission must satisfy the strictures of the penal repression regime. The military commissions provide for the prosecution of acts committed against persons protected by the Geneva Conventions. The commissions are statutorily limited to "offenders or offenses that . . . by the law of war may be tried by a . . . military commission." 10 U.S.C. § 821. In his particular case, Hamdan is charged with "offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." Charge Sheet, at 2.

The charges of "attacking civilians" and "terrorism," as defined by the military commission orders, necessarily include allegations of conduct violating Common Article 3—if nothing else. Both of these charges allege that Hamdan (1) engaged in the relevant conduct in the context of an armed conflict; and (2) conspired to attack and kill persons not taking direct or active part in hostilities. Military Comm'n Instruction No. 2, *supra*. These elements correspond directly to the requirements of Common Article 3—provided that the "armed conflict" in question is one covered by the provision. The terrorism charge also necessarily alleges that such

attacks were motivated by a specific criminal purpose—namely, to intimidate or coerce a target population, or to influence the policy of a government. *Id.* at 13. This additional element suggests only that terrorism is an aggravated form of conduct that otherwise violates Common Article 3. Moreover, the charge of "murder by an unprivileged belligerent" necessarily alleges that Hamdan committed acts of violence in time of armed conflict without conforming to the requirements for lawful combatant status as defined by Article 4 of the GPW. *Id.* at 3-4, 13-14. Indeed, the Geneva Conventions feature prominently in the Military Commission Instruction No. 2, which provides that "an accused is entitled to raise any defense available under the law of armed conflict." *Id.* at 2.

That Hamdan is not formally charged with violations of the Geneva Conventions, as such, is irrelevant. States cannot subvert the requirements of the Conventions simply by manipulating the title of the offense charged. *See, e.g., III Commentary, supra,* at 621 n.1 (noting some then-existing domestic legislation that was considered to satisfy the obligation to criminalize violations of the Conventions). Indeed, the U.S. treaty makers recognized that breaches of the Geneva Conventions would be prosecuted through regular domestic law. That is, the Executive informed the Senate that then-existing federal law could be employed to meet the penal repression regime under the Conventions, and the Senate accepted this assurance in consenting to ratification. *See, e.g.*, Sen. Exec. Rep., Sen. Comm. on Foreign Relations, No. 84-9 (1955), at 27.

Finally, Hamdan's commission fails to meet the obligations of the penal repression regime in that it, at a minimum, clearly violates GPW Article 106. Article 106, made applicable to Hamdan's trial by virtue of the penal repression regime, requires that the accused "shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any

sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial." Members of the U.S. armed forces are entitled to an elaborate process of appellate review, including review in the U.S. Court of Appeals for the Armed Forces and the right to a petition for a writ of certiorari in the U.S. Supreme Court. R.C.M. 1201-1206. The military commission orders, on the other hand, recognize no right to direct judicial review. 32 C.F.R. §§ 9.2 & 9.6(h) (noting that Commission findings are final upon review by the President or Secretary of Defense). Indeed, it is just such specialized procedures for war crimes trials that the penal repression regime was designed to prohibit. As the ICRC Commentary explains:

> The court proceedings should be carried out in a uniform manner, whatever the nationality of the accused. Nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts. There is therefore no question of setting up special tribunals to try War criminals of enemy nationality.

III Commentary, *supra*, at 623.

CONCLUSION

For the reasons stated above, Hamdan's commission violates U.S. treaty obligations under the 1949 Geneva Conventions for the Protection of War Victims.

Dated: January 6, 2006 Respectfully submitted,

MARK A. PACKMAN
Counsel of Record
Gilbert Heintz & Randolph LLP
1100 New York Ave., NW
Suite 700
Washington, DC 20005
(202) 772-2320

Counsel for *Amici*

APPENDIX: *AMICI*

Ryan Goodman

Ryan Goodman is the J. Sinclair Armstrong Assistant Professor of International, Foreign, and Comparative Law at Harvard Law School. He is also the Chair of the Faculty Executive Committee for the Human Rights Program at Harvard Law School. He has worked at the U.S. Department of State, the International Criminal Tribunal for the former Yugoslavia, and nongovernmental organizations in India, South Africa, Switzerland, Thailand, and the United States. His publications include International Humanitarian Law (Oxford University Press, forthcoming 2007) (with Derek Jinks) and International Human Rights in Context (Oxford University Press, 3d ed., forthcoming 2006) (with Henry Steiner & Philip Alston).

Derek Jinks

Derek Jinks is an Assistant Professor of Law at the University of Texas School of Law. He has worked in the Prosecutor's Office of the International Criminal Tribunal for the Former Yugoslavia. He has also worked as Senior Legal Advisor and United Nations Representative for the South Asia Human Rights Documentation Centre in India; and served in the delegation of the International Service for Human Rights at the Rome conference for the establishment of a permanent International Criminal Court. Prior to his appointment at Texas, he also taught at Arizona State University College of Law and the University of Chicago Law School. He is the author of The Rules of War: The Geneva Conventions in the Age of Terror (forthcoming Oxford University Press 2006) and International Humanitarian Law (forthcoming Oxford University Press 2007) (with Ryan Goodman).

Anne-Marie Slaughter

Anne-Marie Slaughter is Dean of the Woodrow Wilson School of Public and International Affairs and the Bert G. Kerstetter '66 University Professor of Politics and International Affairs at Princeton University. Prior to becoming Dean, she was the J. Sinclair Armstrong Professor of International, Foreign and Comparative Law and the Director of Graduate and International Legal Studies at Harvard Law School. She is also the former President of the American Society of International Law. Dean Slaughter is a Fellow of the American Academy of Arts and Sciences and serves on the board of the Council on Foreign Relations. Her book, A New World Order, was recently published by Princeton University Press.